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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 1

SECURITIES AND EXCHANGE COMMISSION,
*Petitioner,*

*vs.*

ENGINEERS PUBLIC SERVICE COMPANY, *et al.*

No. 2

ENGINEERS PUBLIC SERVICE COMPANY, *et al.*,
*Petitioners,*

*vs.*

SECURITIES AND EXCHANGE COMMISSION

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia

## REPLY BRIEF FOR ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

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IN THE

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OCTOBER TERM, 1945

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No. 2

SECURITIES AND EXCHANGE COMMISSION,
Petitioner

*vs.*

ENGINEERS PUBLIC SERVICE COMPANY, *et al.*

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No. 3

ENGINEERS PUBLIC SERVICE COMPANY, *et al.*,
Petitioners

*vs.*

SECURITIES AND EXCHANGE COMMISSION

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On Writs of Certiorari to the United States Court of Appeals for the District of Columbia

## REPLY BRIEF OF ENGINEERS PUBLIC SERVICE COMPANY AND SUBSIDIARIES

### I

### The Constitutionality of Section 11(b)(1) Under the Commerce Power

In its brief in this Court, the Commission seemingly shifts the emphasis of its approach in attempting to justify the constitutionality of Section 11(b)(1) under the Com-

merce power. In the court below, the Commission argued (Com. Br. below, p. 54, n. 65), that since Engineers had registered under the provisions of Sections 4 and 5 of the Act and had not applied for exemption under Sections 3(a)(1) and 3(a)(2) of the Act, "the Commission was entitled to assume, without express findings, that Engineers was a holding company interstate in nature and engaged in interstate commerce. And Congress was entitled to make a similar assumption as to all holding companies which register and cannot obtain any exemption from registration." As Petitioners pointed out in their brief below and in their main brief in this Court, this argument is wholly fallacious when the provisions of Sections 4 and 5 and Sections 3(a)(1) and 3(a)(2) are critically examined. Furthermore, as Petitioners have also pointed out, this Court, in its opinion in *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419 (1938) precluded any such contention by expressly stating at page 435 that:

> "It is idle to contend that registration pursuant to the decree will subject the defendants to the Act as an integrated whole . . ."

The Commission now argues (Com. Br., p. 40) that since Engineers and its subsidiaries are a single system, since Engineers has and exercises control over the system, and since there are involved in the business in which the system is engaged important interstate commerce transactions carried out and performed by use of the facilities of interstate commerce, Congress has power under the Commerce clause to enact Section 11(b)(1) of the Act pursuant to which the orders here under review were entered.

However, the Commission's new approach, Petitioners believe, is also clearly fallacious. Let us assume as the Commission asserts, (although the Commission has made

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no "findings" with respect to any of these matters) that Engineers and its subsidiaries are engaged in some activities which do constitute interstate commerce (such as transmission of power across State lines) and that they are, because of that fact, to some extent at least, subject to the control of Congress under the Commerce power. It is, however, wholly illogical to conclude that any of these activities are sufficient to subject Engineers to the power of Congress *for all purposes,** and particularly for purposes of the divestment provisions here under attack.

The power of divestment asserted in Section 11(b)(1) impinges directly on the ownership by Engineers of securities of its subsidiaries. The Commission's argument as now phrased is to the effect that merely because Engineers and some of its subsidiaries are engaged in some things which are or may affect interstate commerce, therefore the ownership by Engineers of its subsidiary securities may be ordered divested. The unsoundness in that argument is that it assumes, without any basis for the assumption, that there is a substantial relationship between the things which it is alleged that Engineers and its subsidiaries are doing which are or affect interstate commerce on the one hand, and such ownership of the securities ordered divested on the other hand.

In our main brief (Pet. Br., pp. 22-23) we illustrate the length to which this unsound argument is carried in this case by reference to the Lake Charles, Louisiana, water business owned by Gulf States, a subsidiary of Engineers. By the divestment orders here under review, Engineers is required to divest itself of its ownership of securities of Gulf States and such divestment orders necessarily include the divestment of the Lake Charles

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* All italics in this brief are supplied unless otherwise noted.

water business. Everything contained in the record points to the fact that this water business itself is of a purely intrastate character. Congress has not in the Act declared that this local business affects interstate commerce in any way, and neither the Commission nor any court has made any findings to that effect, and even if one applies one's imagination to the problem, no substantial relationship of that business to any of the alleged interstate acts of Engineers and its subsidiaries results. Yet by the orders in this case the divestment by Engineers of its interest in that water business is clearly required.

The truth of the matter is that Section 11(b)(1) should have provided, before any ownership or control could be divested, that a determination should be made by the Commission that such ownership or control constituted or affected interstate commerce. This would have saved its constitutionality under the Commerce clause. But nowhere in Section 11(b)(1) or elsewhere in the Act is there any provision for any such determination; and the lengthy findings and opinions of the Commission contain no findings to the effect that the ownership of the securities which are made the subject of the divestment orders are or affect interstate commerce and, indeed, no mention of the term "interstate commerce". In fact, the Commission has consistently taken the position that any such determination by it would have been "improper".

The essential and basic fallacy of the Commission's position on the validity of Section 11(b)(1) under the Commerce clause lies too deep, therefore, to be overcome by a mere shift of emphasis in the Commission's argument. It lies in the complete lack of relationship between any interstate activity in which Engineers or any one or more of its subsidiaries may be engaged and the only

subject upon which Section 11(b)(1) operates, namely, the ownership by Engineers of the securities of, or its control over, its subsidiaries. This basic lack of relationship, coupled with the failure of Congress to limit application of the section to situations where an effect upon interstate commerce are shown, requires Section 11(b)(1) to be stricken down as a violation of the Commerce clause.

## II

## The Constitutionality of Section 11(b)(1) Under the Due Process Clause of the Fifth Amendment

Petitioners believe that only one point contained in Commission's argument in support of the constitutionality of Section 11(b)(1) under the Due Process clause needs mention.

As an attempted answer to Petitioners' argument that the effect of the challenged orders is retroactively to take important property rights of Petitioners without just compensation (Pet. Br., p. 54), the Commission undertakes to show by quotations from various statistical services that the so-called "liquidating value" of the subsidiary securities exceeds the market price of the Common Stock of Engineers (Com. Br., p. 43, n. 18).

Disregarding the fact that the appraisal of the break-up values mentioned was made by unknown persons whose knowledge of the facts on which the appraisals were based is also unknown, neither the statistical services nor the Commission point out certain obvious direct and indirect reasons why the impact of the Act itself would lead to a difference between the appraised value of the subsidiary stocks and the market price of Engineers Common Stock.

Of these reasons, we mention three as follows:

First. Since the passage of the Act in 1935 Engineers has paid no dividends on its Common Stock, not for the reason that it could not have done so, but for the reason that if the Act were constitutional and the orders of the Commission were valid, the divestments to be required could more readily be taken care of if Engineers had at the time of divestment a large reserve of cash to help in the liquidation of its Preferred Stock, outstanding to the extent of more than $39,000,000. Such failure to pay dividends, the accumulation of idle cash earning no return and the uncertainty as to the resumption of such payment (all of which resulted from the impact of the Act itself) naturally had a depressing effect on the market price of that Common Stock. On the other hand, the analysts in appraising the value of the subsidiary stocks assumed the immediate receipt by the holders of those stocks of the current dividends which are being paid thereon. Thus, the analysts in arriving at the values of the subsidiary stocks gave effect to putting Engineers' idle cash to work and automatically removed the uncertainty as to dividends on the Common Stock of Engineers with the resultant higher values attributable to the subsidiary stocks as compared with that of the non-dividend paying Common Stock of Engineers.

Second. The market price of Engineers Common Stock was also unquestionably depressed by the threat implicit in Section 11(b)(1) that Engineers might, in order to liquidate its Preferred Stock liability, be forced into the necessity of liquidating a considerable portion of its subsidiary stocks, at sacrifice values, in order to raise the balance of the cash necessary to liquidate its Preferred Stock. It is a matter of common knowledge that there are many instances in the Commission files of just that kind of sacrifice in connec-

tion with the administration of Section 11.* Other methods of liquidating the Preferred Stock liabilities such as converting both the Preferred and Common Stocks into a new class of Common Stock would naturally raise the same uncertainties in the mind of the Common Stockholders as to the ultimate ratio of participation of their Common Stock and were equally important in depressing the market price of Engineers Common Stock. In 1943, the Commission itself, in denying Engineers the right to purchase its Preferred Stock on tenders in the open market, refused to permit Engineers to make such purchases on the grounds that under "the existing uncertainty as to when a comprehensive plan will be filed, what form it will take, and indeed, whether one will be filed at all, we find it impossible to determine at this time what treatment would have to be accorded to the preferred stocks under such a plan. Still less are we in any position to determine whether a reasonable relationship exists between such treatment and the prices at which it is proposed now to acquire shares of preferred stock."† If the Commission was unable to determine what treatment should be given to the Preferred Stockholders, persons intending to purchase the Common Stock could hardly be expected to pay the full liquidating value of the underlying securities. It is generally known that prior to 1935, holding company common stocks sold at

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* For an example, see SEC Releases No. 3211, December 26, 1941, No. 4274, April 29, 1943, No. 4297, May 12, 1943 and New York Times, October 30, 1945, which disclose that National Power & Light Company, in order to liquidate its preferred stock, as a step in compliance with the Act, in 1942 exchanged 257,336 shares of common stock of Houston Lighting & Power Company on the basis of 2 shares of Houston common for each share of National $6 Preferred and in May 1943 sold its remaining holdings of 242,664 shares of Houston common at $51.85 per share. These shares are presently quoted at $83 per share. Had National Power & Light Company retained the Houston common stock instead of distributing it, it would have assets presently worth about $16,000,000 more than the amount realized in sale or exchange.

† S. E. C. Release, No. 4114, February 15, 1943.

prices higher than the break-up values of their subsidiaries.

THIRD. The outstanding Preferred Stock of Engineers is represented by three series carrying respectively dividends of $5, $5.50 and $6 per year. Under the prevailing low interest and preferred stock dividend rates, Engineers could unquestionably have refunded all of its Preferred Stock on a very much lower dividend basis if it had not been for the threat of divestment involved in Section 11(b)(1). The presence of these high Preferred Stock dividends which were required to be paid in priority to dividends on the Common Stock naturally had a depressing effect on the market value of that Common Stock.

Unfortunately the effects of the Act itself on the market price of Engineers Common Stock cannot be translated in dollar amounts, but Petitioners submit that when they are taken into account, they more than account for the alleged "discounts".

The only comparison which would be entirely fair would be one which contrasted the value of Engineers Common Stock free from the divestment threat of Section 11(b)(1) with the value of the stocks of its subsidaries operating independently of the holding company system. The very passage of the Act, however, made such a comparison impossible. Since a fair comparison cannot be made, it would seem to Petitioners better if the Commission had not undertaken to make any.

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## III

### The Excluded "Constitutional" Evidence

The Commission attempts to defend the exclusion of the evidence proffered by Petitioners to show that Section 11(b)(1) has no rational basis in fact on a medley of confused grounds, none of which will stand analysis and most of which are predicated upon a complete misapprehension, or at least a serious misstatement, of the purpose for which the evidence was offered.

The Commission states (Com. Br., pp. 46-47) that the excluded evidence "purported to show that the evils recited in Section 1(b) do not in fact exist and that the Congressional findings in so far as they relate to Section 11(b)(1) are arbitrary and capricious". Nothing could be farther from the truth. Petitioners did not attempt to establish that "the Congressional findings . . . are arbitrary and capricious", because *there are no Congressional findings which relate to the precise issue here involved*, i.e., whether the prohibitory or regulatory (if the latter term may properly be used in respect of the divestment provisions of Section 11) measures selected in the Act have any reasonable relation to accomplishment of the declared legislative objectives. No findings or declarations dealing with this issue are to be found in the Act or in any of the voluminous reports or investigations referred to in the Act. Nor did Petitioners undertake "to show that the evils recited in Section 1(b) do not in fact exist." On the contrary, *assuming the existence of the alleged evils*, Petitioners sought to prove that none of the legislative devices in Section 11(o)(1) has any substantial relationship to the elimination of any of such evils or the accomplishment of any of the Act's declared purposes. *There is thus no conflict what-*

*ever between the excluded evidence and any finding in the Act or in the reports or investigations referred to in the Act.*

It is clear from the foregoing that the Commission's basic contention (i.e., that when Congress has made "findings" on the basis of an "abundant legislative investigation" a court may not consider evidence which is offered to challenge the "judgment of the legislature") is entirely irrelevant. Our contention is not that Congress made "findings" with respect to the precise issue here in question which are not well founded in fact, but that, *without having made any such findings or without having considered said issue,* it undertook, by Section 11(b)(1), to create certain so-called regulatory devices which have no relationship to the accomplishment of its stated purposes.

Petitioners' answer to the Commission's basic contention need not, however, stop at this point. Even if there were in the Act "findings" relating to the specific issue, Petitioners could not be precluded from challenging the factual validity of such findings. Notwithstanding suggestions in the Commission brief which seem to question the very right of Petitioners to show that Section 11(b)(1) is in actual fact arbitrary and unreasonable, this Court has repeatedly held (see cases cited in our main brief, Pet. Br., pp. 76-79) that—

> "... no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis." *U. S.* v. *Carolene Products Co.,* 304 U. S. 144, at page 152 (1938).

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The Commission seeks also to justify the exclusion of the proffered evidence by suggesting "obvious deficiencies" in Professor Waterman's studies. The feeble character of this belated attack (see Com. Br., pp. 51-52) upon the accuracy or soundness of the studies, after years of failure to produce any contradictory data, serves only to emphasize the entire lack of challenge to the great body of the studies and the veracity of their basic structure.* But these are at present irrelevant considerations since the Commission's suggestion goes only to the weight of the evidence and not to its admissibility. If the Commission desired to challenge the accuracy or soundness of the excluded evidence it had abundant opportunity to do so during the course of the hearing by way of cross-examination of Dr. Waterman and otherwise. It chose rather to oppose the introduction of any evidence of the character in question. Having taken that position, all doubts as to the soundness of the

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* With all due deference, we venture respectfully to suggest that determination by this Court of an important constitutional issue is not aided by the Commission's reference to the proffered testimony as "evidence" in quotation marks (Com. Br., pp. 46-47), or by its over-emphasized references to Dr. Waterman's use of "Hollerith machine tabulating equipment" (Com. Br., pp. 51, 54), which is in itself a standard statistical facility, or by referring (Com. Br., p. 55) to an isolated sentence from Dr. Waterman's voluminous studies with the suggestion that "this declaration of individual belief . . . will not be mistaken for the voice of the Constitution." Petitioners have never suggested that complex constitutional issues can be solved by any mechanical device (the use of which was here necessary because most of the data underlying the studies were secured from the "Hollerith" cards which were lent to Dr. Waterman by the Federal Power Commission; R. 920). But, surely, elaborate statistical studies of any character are not subject to belittlement merely by virtue of the fact that mechanical devices have been used in their preparation, any more than the Commission brief would be subject to criticism because the type was set on a linotype machine. Nor have Petitioners presented Dr. Waterman as the "voice of the Constitution." We submit, however, that the elaborate and fully supported studies of Dr. Waterman may not be slightingly tossed aside as mere "individual belief" in view of the Commission's consistent unwillingness to meet head-on the challenge presented by such studies.

studies, if any exist, must necessarily be resolved against the Commission. See, *Pittsburgh Glass Co.* v. *Board*, 313 U. S. 146, 163 (1941). This fact was readily recognized by the court below which, although upholding the exclusion of the evidence, clearly recognized its relevancy and materiality by stating (R. 1234) that—

> "It does not follow that the petitioner is deprived of the well established right to test the constitutionality of the statute by showing that it is completely lacking in factual basis. We hold merely that the proffered evidence was not admissible at the hearing before the Commission, without prejudice to the right of the petitioner to raise the same question hereafter in such other manner as it may be advised."

The Commission further argues (Com. Br., p. 53) that the "fundamental and pervasive deficiency" of Professor Waterman's studies is that they were limited to a brief period, and, moreover, to a period "during which the regulatory provisions of the Act were being enforced by the Commission." These, again, are objections which go to weight and not admissibility, and, moreover, they were not made at the time the evidence was offered. But apart from such considerations, the objections are without foundation. As to the suggestion that the study did not cover a long period of time, it was pointed out by Dr. Waterman (R. 923) that his study deals with *relationships* between various groupings of utilities, which relationships are not subject to rapid or wide fluctuations and hence that his study covered a sufficient period of time to insure its statistical reliability. As to the point that the study was made during a period when the regulatory provisions of the Act were being enforced by the Commission, this fact, far from weakening the proffered evidence greatly

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strengthens the study since the data thus presented afford a factual basis for determining, *inter alia*, whether Section 11(b)(1) violates due process as an unnecessary and unduly drastic prohibitory provision in light of the accomplishment of the Congressional objectives by means of the less severe but effective regulatory provisions of the Act, a well established constitutional approach under the due process clause. Cf. *Liggett Co.* v. *Baldridge*, 278 U. S. 105 (1928); *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402 (1926).

As to both the last mentioned suggestions of the Commission, we point out the constitutionality of legislation such as is here involved is dependent upon its reasonableness in the light of the facts as they exist at the time of the attempted enforcement thereof. See *Nashville C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, at page 415 (1935). In the instant case the hearings before the Commission were begun in April, 1941 (R. 362) and the evidence in question dealt with the nation's electric and gas utility industries during 1939 and 1940. The evidence thus related to the *latest possible period immediately prior to the hearings.* As a matter of fact, it was not possible for Dr. Waterman or anyone else to prepare similar studies relating to periods prior to 1939 because, as indicated by Dr. Waterman (R. 919-920), the materials upon which his study were largely based were not available to anyone until shortly before the studies were made.

As a further attempted justification for the exclusion of the evidence, the Commission states, without argument (Com. Br., p. 47), that "an administrative agency is not empowered . . . to receive for its consideration evidence proffered to show that its governing statute is invalid." As shown in our main brief (Pet. Br., pp. 78-84), this con-

tention is not only ill-founded* but irrelevant, since even if the Commission were precluded from passing on the constitutionality of the Act, there is no reason why the Commission could not receive such evidence, and any related evidence which the Commission's staff might care to introduce, and, without passing upon its effect, report the same to the court below for consideration and determination of its effect upon the constitutional issue. In no other way, as pointed out in our main brief (Pet. Br., pp. 80-84), can Petitioners be accorded their admittedly "well established right to test the constitutionality of the statute by showing that it is completely lacking in factual basis."

## IV

### The Choice of the Single System

The Commission's argument of this point is characterized by a significant failure even to mention, let alone discuss, the principal contentions of Petitioners and the precise holding of the court below.

In this Court, as in the court below, Petitioners contend that neither Section 11 nor any other provision of the Act purports to confer upon the Commission authority to select one of two or more integrated public-utility

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* In support of this statement, the Commission cites (Com. Br., p. 47), not only *Panitz* v. *District of Columbia*, 112 F. (2nd) 39 (Ct. of App. D. C., 1940), which is discussed in our main brief (Pet. Br., p. 80), but also *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475 (C. C. A. 6th, 1943). While the Court, in the *Todd* case, did state (p. 478) that "the Commission is not empowered to rule upon the constitutionality of statutes", its holding was that, under Section 24(a) of the Act, it could not pass upon a constitutional point which had not been urged before the Commission; so that the necessary holding of the *Todd* case is that, in view of Section 24(a), *the Commission is required to pass upon—or at least to receive and report upon—constitutional issues.*

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systems which may be retained by the holding-company as its single system; and that if the Act purported to grant any such authority it would be void as an unlawful delegation of legislative power since there is a complete absence of any legislative standards to guide the Commission in making such selection. In substance this contention was upheld by the court below, which expressly found that "No standards governing the choice of a principal system are set up in the Act" (R. 1231).

*The Commission avoids any mention of these contentions!* In fact, not a word may be found in its brief respecting the presence or absence of legislative standards to govern the Commission's choice of the single retainable system; and instead, the Commission devotes itself, first, to an implied denial that Engineers has been deprived of the right to make the choice for itself, and, then, to various extraneous considerations which, it is asserted, require that the Act be construed so as to give the Commission the power to make the choice.

The Commission asserts that "No action of the Commission prevented Engineers from making known its selection of either the Virginia electric system or any other utility system as its 'single' system", and that Engineers has been "given every opportunity to make its own choice" (Com. Br., p. 122). It is difficult to see how the Commission can seriously advance this argument. In its order of September 16, 1942, the Commission specifically reserved the right "to grant, deny or dispose of" any petition (*i.e.*, to retain Gulf States in lieu of Virginia) "according to the merits of the grounds urged in support thereof" (R. 161). So long as the Commission asserts the validity of its said order, *i.e.*, as long as it asserts the right to determine whether a petition filed by Engineers to retain Gulf States shall be granted or denied, or how it shall be dis-

posed of, Engineers certainly is not in a position to make a free choice.

Once this point has been passed, the Commission's virtual admission that there are no legislative standards governing its selection of the retainable single system would seem to conclude discussion. It can be readily shown, however, that the Commission's case stands no better even on the basis of the further and entirely extraneous considerations advanced by it.

The Commission first suggests that the whole matter as to the selection of the single system is academic since Engineers has already made a "substantive choice" of Virginia as its single system, this suggestion being based on the ground that "Virginia is the obvious choice by any standard". As to this argument it is enough to point out that the case was both argued and decided in the court below on the assumption, not challenged by the Commission, that Engineers had carefully preserved its right to choose as between Virginia and Gulf States.*

In support of its assertion that Engineers has already made a "substantive choice", the Commission points out that the properties of Virginia have been recently augmented by the merger into Virginia of Virginia Public Service Company, and, further, (a point which the Commission says is "most important") that Engineers has represented that retention of Virginia will afford it substantial tax savings through the filing of consolidated income tax returns,

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* In its Findings and Opinion of July 23, 1941, the Commission said that (R. 277) "as we have stated above, a choice of either the Virginia or the Gulf States electric system would be acceptable here". The facts and figures stated in the Commission brief (Com. Br., pp. 120-121) indicate that the question may well be a close one.

It is interesting to note in this connection that, in the Findings and Opinion mentioned above, the Commission itself confessed considerable doubt as to whether it or the holding company had the right of choice (R. 277).

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whereas its interest in Gulf States is not sufficient to permit the filing of such returns (Com. Br., pp. 120-121). With respect to the merger, Petitioners concede that the relative values of the two systems available for selection as the single system will be factors to be considered by Engineers, along with many others, *if and when Engineers is permitted to make the choice.* With respect to the tax point, the Commission is apparently unaware that changes in the Excess Profits tax law* and the merger of Virginia Public Service Company into Virginia has had the effect of substantially reducing the tax savings in respect of Virginia and thus removes such savings as an important factor to be considered in making the choice of the single system.

The Commission further argues (Com. Br., p. 124) that if the Act does not authorize the Commission to select the single system, as Engineers contends, a difficult task will be imposed on the Commission of making advisory findings as to properties retainable with each of several systems. A short answer to this argument is that, if the interpretation for which Engineers contends is required by the language of the Act or is necessary to avoid unconstitutionality, the administrative tasks imposed on the Commission thereby are inescapable. In this particular case, since the Commission has already made its advisory findings as to Gulf States, no additional burden will be thrown on the Commission and no further delay occasioned except to the extent that, as indicated in our main brief, these advisory findings have been based on the Commission's own misinterpretations of the Act.

In their main brief, Petitioners argue (Pet. Br., p. 90) that under a proper construction of the Act the only order

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* See Section 205 of the Revenue Act of 1943, amending Section 714 of the Internal Revenue Code.

which the Commission may properly enter is an alternative order which would require Engineers, during the period of divestment specified in the Act, to dispose of either the Virginia system or the Gulf States system as Engineers, in its sole discretion, may determine to be desirable under all the circumstances existing at the time. In this connection the Commission argues (Com. Br., p. 125) that such an alternative order would be a fruitful source of delay since the "holding company might find during the period of divestment an excuse to divert time and energy from the disposition of the properties required to be divested to unnecessary contemplation and discussion concerning the selection of a 'system' ". No weight attaches to such an argument since it assumes that a holding company would refuse to obey a valid order. The elaborate enforcement remedies in the Act are fully adequate to cope with such a contingency.

## V

## The Interpretation of Clause (B) of Section 11(b)(1)

### A. The Language of Clause (B) is Clear and Viewed by Itself or in the Light of Other Provisions of the Act Plainly Permits Retention of Properties in Two Geographical Areas

In referring to the one-area interpretation of clause (B) adopted by the Commission, the lower court said (R. 1214):

> "... In other words, the Commission gave paragraph (B) the same meaning as if it read: 'All of such additional systems are located in the same State as the principal system or in adjoining States or in a contiguous foreign country'; or, as the Commission

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itself said, paragraph (B) should be construed as if it read: '(B) All of such additional systems are located in a State *in which the single integrated public utility system operates* (italics in original), or in States adjoining such a State, or in a foreign country contiguous thereto.' "

This means that clause (B) must be read as if the word "additional" were stricken out or as if the words "in which the single integrated public utility system operates" were inserted. While the Commission brief agrees with the lower court that "the matter is not free from doubt", the brief attempts to support the restricted interpretation by reference to other provisions of the Act and by its legislative history, although on the face of clause (B) it clearly supports the two-area interpretation.

The meaning of clause (B) alone is not questioned by the Commission except that the brief points out that certain holding companies have made the contention that the reference to "adjoining States or in a contiguous foreign country" should be construed to refer to "a chain of States, each touching one of the other States in the chain" rather than to make the point of reference "one State" in which the additional systems are located. But it does not, as the Commission argues (Com. Br., p. 58), require a "strained" construction of the words to avoid this result, for the point of reference for "*adjoining* States" is supplied by the words "one State" that immediately precede them in the Act. The Act could not more clearly refer to *additional* systems located in any one State or in any States adjoining that one State. So it is language in itself wholly free from ambiguity that the Commission seeks to alter by references to other clauses and the legislative history. The lower court aptly points out that any support

for the one-area interpretation plainly cannot be derived from clause (B) itself:

> "The one area interpretation adopted by the Commission depends upon the legislative history of the Act and the general purposes therein expressed" (R. 1214).

The Commission brief attempts to establish some support for the one-area interpretation by reference to clauses (A) and (C), contending that since those clauses set up tests involving the relationship of the principal system to additional systems, the former an economic relationship, the latter a size relationship, it should be inferred that clause (B) was intended to require a close geographic relationship between the principal system and the additional systems.

The relationship argument as to clauses (A), (B) and (C) is summarized in the Commission brief thus (Com. Br., p. 59):

> "The fact that Clause (B) is parallel with and serves a limiting function similar to Clauses (A) and (C) in the section indicates that it likewise describes a necessary *relationship* (italics in original) between additional systems and the 'single' system—one of geographical proximity."

It begs the real issue, however, so far as the text is concerned, to assume that "Clause (B) is parallel with and serves a limiting function similar to Clauses (A) and (C)."

Clause (A) in terms provides that the test is whether each of such "additional systems" cannot be operated as an independent system without loss of substantial economies which can be secured by the retention of control by such holding company of such system. In applying that test,

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of course, the distance between the principal system and the additional system may be a relevant, but not a necessarily controlling factor. When Congress intended to make significant the relationship in economy of operation between the principal system and the additional system, it used language apt for the purpose.

Clause (C), in a grammatical sense, deals solely with the aggregate size of the *additional* systems. The subject matter of all three standards, (A), (B) and (C), as expressly stated in the introductory proviso, was "*additional* integrated public utility systems", so that the reference in clause (C) to "*such* systems" was grammatically to "additional systems" only. The Commission, however, held that "such systems" in clause (C) referred to the combination of the principal system and the additional systems, and we are not here taking issue with that view. The best argument for that interpretation was that all reference to "additional" systems was omitted in clause (C), whereas it was the key word in the proviso and in clauses (A) and (B), and further because, unless clause (C) be so construed, the result might be to permit systems in two widely separated areas to be retained, which would be so large in the aggregate as to be inconsistent with the purposes of the Act. Under this latter construction, the words "area" or "region" in the singular do not specially aid the construction, as is suggested in the Commission brief, because, in accordance with the well settled rule of construction, these words may properly be construed to read in the plural as well as in the singular where the context makes this appropriate.* The significant fact is that all

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* See United States Code Title I General Provisions, Chapter 1, Rules of Construction, Section 1 (U. S. C. A. Vol. 1) "In determining the meaning of any Act or resolution of Congress, words importing the singular number may extend and be applied to several

reference to "additional" systems is omitted in clause (C). This indicates that the inclusion of "additional" in clause (B) without any reference to the principal system was just as Congress intended. Hence, instead of support being found in clauses (A) and (C) for the one-area interpretation, the difference in treatment with respect to additional systems emphasizes that the words in clause (B) should be given their usual and natural meaning, and as such should be held to relate only to the location of the additional systems without any reference to the location of the principal system.

The Commission brief then relies on the recital of one of the evils in Section 1(b)(4) as internal evidence in the Act supporting the one-area interpretation of clause (B). This recital is as follows:

> ". . . when the growth and extension of holding companies bears no relation to economy of management and operation or *the integration and coordination of related operating properties; . . .*" (Italics in original) (Com. Br., p. 69).

This language, the brief argues, shows that the additional system, to qualify for retention with the principal system, must be located close to the principal system. Here again the portion of the language emphasized is just as consistent with the two-area interpretation as it is with the one-area interpretation. On the one-area interpretation, admittedly the additional systems (though they must be in the same State as the principal system) are not required to be integrated or coordinated with the principal system, and it may normally occur that in a large State, such as Texas

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persons or things; words importing the plural number may include the singular . . ."

See also *Barr* v. *United States,* 324 U. S. 83 (1945), where "buying rate" was construed to mean "buying rates".

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or California, they would not be so integrated or coordinated. This must be so, because, if they were, they would become part of the integrated system itself under the definition of an integrated system contained in Section 2(a)(29) of the Act. So with the two-area interpretation. Here also they are not required to be integrated or coordinated with the principal system but on this interpretation may be in any State or States adjoining that State regardless of the location of the principal system. On the crucial point of the location of the principal system with reference to such additional systems the quoted clause is colorless. It does not say that the "operating properties" must be "related" in any geographic way. Indeed, so far as the words go, the "relation" might quite as well be determined by investment or management considerations. The full scope of the "relation" contemplated by Section 1(b)(4) would seem to be defined by the economy requirement of clause (A). Such an interpretation gives full effect to each provision of the Act, without requiring one provision to override the words of another. In any case, the quoted language from Section 1(b)(4) speaks in the alternative, so it is sufficient if holding company ownership bears a relation either to economies *or* to integration and coordination of properties (related to each other by economies or otherwise). So, from any point of view, we submit that the general declaration of Section 1(b)(4) is entirely consistent with both the one-area and the two-area constructions.

**B. Nothing in the Legislative History of Section 11(b)(1) Warrants an Interpretation of Clause (B) Contrary to Its Plain Meaning**

Petitioner's brief not only anticipates and answers every argument of the Commission on this point but sets

out the material facts much more fully than the Commission brief. Indeed, the Commission brief omits any mention of many of the more significant facts in the legislative background,—such as, the origin and substance of the two-area compromise idea as originally proposed on April 4, 1935 during House Committee hearings by Mr. Harriman, President of the United States Chamber of Commerce (Pet. Br., p. 99); the complete impasse between the Senate and the House, evidenced by numerous votes on the crucial policy question as to geographical location and number of permissible additional systems, with the House at all times prior to vote on the compromise voting by large majority to insist on the multi-area policy (Pet. Br., p. 100); the approximately equal division (45 to 44) in the membership of the Senate as to the advisability of continuing the Section 11 "elimination" provisions in the Senate bill (Pet. Br., p. 99); the Rayburn speech of August 22, 1935, when the compromise (now Section 11) was first proposed, in which in referring to the compromise Mr. Rayburn referred to it as one "which did not go quite so far as the House provision because of the necessity of meeting (A), (B) and (C) standards with respect to additional systems" (Pet. Br., p. 100); the President's "generous concession" letter of October 21, 1935 (Pet. Br., p. 101); the complete omission, in any Committee report or discussion regarding the compromise prior to the passage of the Act, of any reference to the idea that all permitted systems must be in one area or region; all of which show the very substantial nature of the compromise which was intended and without which Section 11 could not have been passed. As was said by Judge Soper, in the minority opinion of the retention of Virginia gas system as an additional system:

> "... it is certain, as the legislative history shows, that the Act would not have received the approval

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of Congress if it had not contained the provisions which prohibit the unnecessary disturbance of existing conditions" (R. 1220).

Under the Commission's one-area interpretation of clause (B), combined with the restricted interpretations of clauses (A) and (C) herein elsewhere discussed, the momentous "compromise" has become for all practical purposes in this case wholly illusory.

As shown in our main brief, the Commission is unable to show any real aid for its distorted construction of clause (B) by the vague and ambiguous statements of House members. Representatives who favored the multi-area provisions of the House Bill spoke vigorously in opposition to the compromise, as pointed out in the Commission brief, but, in so doing, they were plainly referring to the anticipated combined effect of the application of the A-B-C standards as these might be construed by the Commission. Their fears have been shown by experience to have been well founded. Thus, the one-area interpretation must finally rest on statements included in the speech of Senator Wheeler delivered after the Act was passed and upon certain ambiguous phrases in the Conference Report.

As we have shown in our main brief, Senator Wheeler's remarks, which are the only clear evidence in the entire Congressional Record to support the one-area interpretation of clause (B), are entitled to no weight whatever because he was an ardent partisan in favor of the extreme "elimination" provisions; he had declined to make a statement on the compromise Section 11 prior to its passage by the Senate although specifically invited to do so by Senator Norris during the pendency of the motion to adopt the Conference Report; and his statement was made after the controversy over the elemination provisions was settled.

So far as the legislative record shows, he alone knows why he chose such an occasion and such a way to make a matter of record his conception of the legal effect of the measure which had just been passed. His interpretation was plainly contrary to the language of clause (B) and in conflict with the spirit of the statement of the co-patron of the Bill, Mr. Rayburn, and that of the President's letter, when they were seeking to induce votes for the compromise.

There remain then only certain phrases in one paragraph of the Conference Report as possible support for the one-area interpretation, although upon a natural construction of the language the paragraph is just as consistent with the two-area interpretation as with the one-area interpretation.

The paragraph rewritten with interpolations in brackets indicating its natural meaning is as follows:

> "The substitute, therefore, makes provisions to meet the situation where a holding company can show a real economic need on the part of *additional integrated systems* [that is, which meet the economic test contained in clause (A) of Section 11(b)(1)] for permitting the holding company to keep *these additional systems* under localized management [evidently an ellipitical statement of the words 'advantages of localized management' as contained in clause (C) of Section 11(b)(1) and a very different concept from 'localized management'] with a principal integrated system. Under such circumstances the Commission is directed to permit the holding company to retain control of *such additional systems*, even though not physically integrated with the principal system, provided all *such* [additional] *integrated systems* [that is those systems which meet the economic test contained in clause (A) even though not physically integrated with the principal system], are located in the same State or States or in adjoining

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States or a contiguous foreign country." (Italics supplied to show language relied on by Commission.)

It will be noted that not one word is contained in the above paragraph which indicates that additional systems to be retained must be located in the same State "in which the single integrated public-utility system operates." Everything contained in the paragraph is entirely consistent with the geographical location elsewhere; and yet acting principally on this item of legislative history the Commission undertakes to justify its reading of clause (B) by inserting the words "in which the single integrated public utility system operates", thus entirely changing the clear and natural meaning of the Act.

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As to the alleged incongrous consequences that may flow from the two-area interpretation, we have shown in our main brief (Pet. Br., pp. 111-113) that the results of the one-area interpretation may be equally incongruous, although, in the normal situation, a reasonable and logical scheme, consistent with the real compromise which the Congress intended, is provided in the application of the A-B-C standards on the two-area basis.

In the Commission brief, one further argument, suggested by the lower court's opinion, and not relied on by the Commission in its decision (R. 257-276), is made to support the one-area interpretation—i.e., that, since the Commission held, in applying the (A) and (C) standards, that neither the Virginia gas system nor the Savannah electric system might be retained with the Virginia electric system, the Commission properly could and would have held that the Gulf States and El Paso electric systems did not meet the (A) and (C) standards, so that any error in

the Commission's refusal to receive evidence on these issues was harmless. The fallacy of this argument is at once apparent. The economies in joint operation involved under clause (A) and the size test involved under clause (C) plainly do not depend on the distance factor only. The character of the area or region involved, the size and characteristics of the operations, the size of executive, technical staffs and organizational set-ups of each system and of the holding company, the facilities for communication between all parts of the systems and numerous other factors are not merely material but important in the formulation of any judgment as to whether the (A) and (C) standards are satisfied. It is certainly not to be assumed that the Commission would pre-judge the merits of these matters before the evidence had been received or that counsel may anticipate a Commission judgment.

We, therefore, submit that the Commission was plainly in error in adopting the one-area interpretation of clause (B) and that, on this ground, the order of the Commission in directing Engineers to divest itself of Gulf States electric and gas systems and El Paso electric system should be set aside, and that the case should be remanded to the Commission for the taking of evidence in regard to the satisfaction of the A and C standards with respect to these additional systems in combination with Virginia as the principal system.

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## VI

## The Proper Meaning of the Words "Substantial Economies" in Clause (A) of Section 11(b)(1)

We do not think it necessary on this point to find a precise label for the Commission's action, whether a "finding" that substantial economies would not be lost by separation of the gas properties, or a refusal to make a finding that substantial economies would be lost, or a declaration of inability to make such a finding (Com. Br., p. 77). Regardless of those technicalities, the outcome is unmistakable: Engineers asserted that, on the evidence received, the gas properties were not within the divestment command of the statute, but the Commission held differently and ordered their divestment.

Nor is there any occasion here to review the evidence in order, as the Commission says is prerequisite to any reversal (Com. Br., p. 77), to show that the tenor of the evidence was such as to leave no reasonable opportunity for difference of view and that a finding of the satisfaction of clause (A) was thus required.

Such arguments can only confuse the issue presented on this point. Our contention is that the Commission's consideration of this point was governed by an erroneous legal standard, not drawn from the Act, but inconsistent with it. This is a purely legal question and typically one for independent judicial review. Thus, in summarizing settled rules, this Court said in *Rochester Tel. Corp.* v. *U. S.* 307 U. S. 125 (1939), at 136:

> "... if the Commission was found to have proceeded on erroneous legal principles, the Commission would

> be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles."

There can be no doubt of what was the standard governing the Commission's consideration. It is stated in the Commission's opinion (R. 106):

> ". . . we must require clear and convincing evidence of a loss of economies which would seriously impair the effective operations of the systems involved in order to permit the retention of an additional system."

In other words, no loss of economies can justify retention unless of such scope as seriously to impair the effective operations, not alone, it will be noticed, of the additional system, but indeed of both of the two systems involved. This is a startling pronouncement and one that the Court will wish to weigh with care in order to see the full extent of its meaning. There seems scant room to suppose that the mere loss of economies in itself, however great, could seriously impair the effective operations of the additional system in any case at all except where the additional system is too small or weak to stand alone. It is even more difficult to imagine a situation in which a mere loss of economies in itself, however great, could impair the effective operations of *both* systems concerned. Presumably that could be so only where the principal system, as well as the additional system, is too small or weak to stand alone. Before this Court the Commission retreats, to some extent, from the rigors of this standard proclaimed in its own opinion that disposed of the controversy here at bar, but only to an indefinite extent, and very adroitly. We say adroitly because, while admitting, with admirable power of understatement, that this "is a strong formulation of the stat-

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utory standard" (Com. Br., p. 80), the brief still asserts that this is the underlying premise with which any particular form of words the Congress may have used, a matter, it would seem, of slight consequence in itself, must be reconciled. To the extent that such arguments permit clear insight into the nature and basis of the Commission's standard, they help in the task of decision, but they are not competent to change the standard the Commission itself applied in its own decision of three years ago.

That standard, we submit, is clearly different from the words of the Act, which, so far as here pertinent, authorize the retention of an additional system whenever the additional system

> ". . . cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;" [Sec. 11(b)(1)(A)]

However great the Commission's expertise (which we do not question), surely the place for its exercise is within the administrative area. Within the legislative area, the Congress is the authoritative exponent of its own intention, and the words it uses are the best measure of its intention. Where they are clear, as here, they are decisive.* The Act

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* Thus it is entirely unimportant what Senator Wheeler may have said (Com. Br., pp. 79-80) after the bill passed the Senate (Pet. Br., p. 107). Statements by opponents of the bill, also cited in the Commission brief (Com. Br., p. 80), are, as shown in our main brief (Pet. Br., p. 106), not a permissible source of construction. The Commission's brief (Com. Br., p. 80) gives an altogether false impression when it says Representative O'Connor "envisaged the independence" of "a little power plant" in various States (79 Cong. Rec. 14168); the cited statement did not say that the exemption of clause (A) was confined to "a little power plant", but that, in the absence of a geographical limitation, holding company control would extend even to "a little power plant".

speaks in objective terms of a perfectly tangible matter of fact, the retention of existing economies, and, of all possible degrees in which that fact might exist, requires not that it be essential to effective operations of both systems, or of either system, but only that it be substantial. This is a non-technical word that is properly read in a non-technical sense as meaning any amount that, measured by the particular circumstances of the enterprise in question, would be considered significant by an ordinary man of affairs.

While the words of the Act do not, we submit, leave any such possibility of question as to justify resort to legislative history, the legislative history, if resorted to, confirms this natural meaning of the words. There developed in 1935, as the previous briefs show at length, a sharp cleavage between the views of the Senate, desiring virtual elimination of all holding companies, and the views of the House, desiring far more liberal and elastic treatment. These divergent points of view were ultimately reconciled in an historic compromise. It was accepted by the House after august characterization, in a letter of the President, as "a most generous concession on the part of the Senate." This "most generous concession" must certainly mean something, else it is clear that no act would have passed. It does not mean anything if the retainable system is limited not only by the geographical requirements of clause (B) and the size requirements of clause (C), but also by an economy requirement of clause (A) so interpreted as to admit no one but those too small or weak to stand alone. In that event, the "most generous concession" to those seeking the privilege of retaining the investment advantages of diversity of risk was only that they might retain, if certain other requirements were satisfied, the burden of supporting those too small or weak to stand

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alone. Such a "compromise" could only be described in other terms.

The practical operation of the extreme standard chosen by the Commission is well illustrated by this record. Of all the integrated systems included in the Engineers properties, the Commission held that only the isolated facilities in "a trading post" named Van Horn, Texas (R. 145), serving 200 customers, and located in a remote rural area about 40 miles from El Paso, satisfied the requirements of clause (A). This is to be the effect of the "most generous compromise" under the Commission's interpretation.

So on the concept of *substantiality* we submit the Commission departs from the manifest intention of the Congress. We believe it departs from the intention of the Congress in another important particular also, the nature of the *economies* to be considered.

The frame of reference here is a simple one. Business is an undertaking in which revenues are received and expenses are paid. A decrease in the latter is an economy. But no increase in the former can be called an economy. It is only a decrease in expense that the Act contemplates by the word "economies". Nor are all possible economies within the contemplation of clause (A). Rather it looks precisely to " . . . economies which can be secured by the retention of such control", but of which a separation would entail "the loss". No words could more exactly say that the determining economies are those actually being realized under joint control that would no longer be realized upon separation. These are to be determined, no doubt, on a net basis, but do not include reductions in operating costs not dependent on joint control that separate management might conceivably realize, and still less do they include any increases in revenue that separate management might con-

ceivably obtain. On this matter of distinctively legislative choice, the Congress chose, quite possibly in the interests of a concrete standard with relative certainty of application, the administrative advantages of which are so ably extolled in the Commission's brief, to lay aside potential savings and potential gains, and look only to actual economies presently being realized.*

We submit the Commission departs from this intention of the Congress when it allows actual economies presently being realized to be offset and extinguished by any potential gains or economies of separate management. That view is a declared basis of the Commission's decision (R. 102, 103). For example, the Commission said:

> "... the possible benefits of unsuppressed development and growth for each business must also be cast in the balance when substantial economies are measured" (R. 103).

While the Congress might have said this, it did not do so, and the Commission exceeds its function when it changes the yardstick that the Congress has supplied. It does change the yardstick when the result of the Congressional criterion (loss of present economies) is reversed by another criterion of "countervailing advantages" (Com. Br., p. 82, *et seq.*).

We pass over the statements in the Commission brief that testimony of industry witnesses on the factual question of economies are to be disregarded as mere projections of an outlawed "economic philosophy" (Com. Br., pp. 85

* It is of interest that the Commission's brief refers to those potential savings and potential gains as "inherently incapable of being reduced to dollars-and-cents terms" (Com. Br., p. 88, n. 48). Economies presently being realized as a result of joint control are, however, neither future nor uncertain, but actual and entirely capable of being reduced to dollars-and-cents terms.

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and 89), though they imply a departure from the judicial attitude which the Commission has so rightly sought to maintain. The next step of the Commission, however, we believe, involves a third departure from the Congressional mandate. That step is to neutralize all evidence of record on the subject of actual economies by sheer conjecture of potential offsetting advantages. Even if it were permissible under clause (A), contrary to our argument above, for the Commission to consider and give weight to potential gains or economies under independent operation, it must have been the Congressional expectation, in line with the settled course of action of all administrative agencies, that judgment on these matters should be based on evidence of record. No doubt the Commission is possessed of an "informed judgment" and is expected to exercise it. But that is to be done upon evidence of record, and not upon some other evidence available elsewhere [*Carter* v. *Kubler*, 320 U. S. 243 (1943)] or without any evidence at all. It is not to be supposed that the Commission, with its accumulated experience and all of its resources of inquiry, is at the mercy of any figures that a "dubious economic philosophy" may inspire. The length of the hearings in this case, and the extent of the cross-examination, are alike evidence to the contrary. It is an important principle, both for the practicability of judicial review and also for the preservation of the administrative process as a means of government, that its conclusions shall be based on evidence, taken at hearings after notice and available for scrutiny.

The Commission transgresses this fundamental rule of administrative fair play, and its suppositions so made should have no weight on the validity of its order. The dissent below was well warranted in the conclusion that:

> "The conjecture of the Commission that compensating advantages might result from separate

management adds no weight to the findings, for the sufficient reason that it is entirely without support in the evidence" (R. 1221).

We submit, therefore, that the Commission's consideration and disposition of the gas properties was controlled by an erroneous legal standard, erroneous as to the extent of the economies requisite for clause (A) and erroneous as to the nature of the financial changes to be considered as economies in the meaning of clause (A). But even if clause (A) were to contemplate offsetting potential advantages under independent operation, that standard is misapplied when the Commission goes by sheer conjecture without support in evidence. On all three grounds we submit that the action of the court below in this regard should be reversed, with instructions to remand for further proceedings before the Commission on the proper legal basis. Viewed on the proper legal basis, the facts would then seem to require a finding that clause (A) is satisfied, for surely all economies to both systems are in point for the purposes of the Act, and they are to be measured by their relation to the net earnings available for return on capital,* for in a system of private operation that must remain a decisive criterion of the power to survive and to supply efficient service. An economy amounting to an increase of 30% in income available for dividends, as in the case of Virginia gas system (R. 105), should not be disregarded under such a standard.†

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* Any reduction in expense necessarily increases net earnings by an equal amount (except only as retarded by income taxes).

† In this Engineers case, the Commission has taken the position that the Virginia gas system is an "integrated public utility system" separate and apart from the Virginia electric system. This position of the Commission leads to a serious inconsistency when Sections 8 and 9(b) of the Act are examined. Section 8 clearly leaves the question of such a combination to the local authorities and Section

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## VII

### The Interpretation of the "Other Business" Clauses of Section 11(b)(1)

We submit that the questions raised by the Commission's action under the "other business clauses" of Section 11 have not become moot but their review and final determination by this Court at this time is desirable for orderly and expeditious judicial procedure and for effective administration of the Act.

We do not ask the Court to review findings that have only an advisory effect (Com. Br., p. 93). We are concerned with the Commission's order (R. 159) and the action it requires. It has been submitted earlier in this brief (p. 18 *et seq. supra*) that clause (B) permits the retention of an additional system or systems in a different area from the principal system. If this Court shall so hold, the Commission will then be faced with the questions whether such continued control in this case satisfies the requirements of clauses (A) and (C) and what other businesses of each system may be retained under the "other business clauses".

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9(b) provides that utility assets, such as the Virginia gas system, may be acquired without the approval of the SEC, provided only that the acquisition is approved by a State commission. Thus if the present order requiring the divestment of the Virginia gas business is carried out, Virginia could, so far as the Act is concerned, on the following day reacquire the gas properties with the approval only of the Virginia Corporation Commission. This inconsistency would be entirely avoided and the obvious intention of Congress carried out if the Virginia gas and electric systems were treated as a single combined system in accordance with the position originally taken by the SEC in the case of *American Water Works & Electric Company, Inc.*, 2 S. E. C. 972, at page 983. The treatment of the combined Virginia electric and gas systems as one system, makes the entire handling by the Commission of the gas system as an "additional" system under the A, B, C standards erroneous (see Pet. Br., p. 127, n. 36).

If the action of the Commission under clause (B) is so disapproved, the Commission's action under the "other business clauses" should be reviewed in order that the Commission, in the further proceedings that will be necessary, may have before it an authoritative formulation of the standards that control its decision.

Even apart from the issues under clause (B), it has also been submitted in this brief (p. 14, *et seq., supra*) that, under the Act, Engineers has the right to choose its principal system, whether Virginia or Gulf States. If this premise is sustained by the Court, it necessarily follows that, to give effect to this right of choice, the Commission's order must be in the alternative, requiring that Engineers divest itself either of Virginia *or* of Gulf States. This right of choice can not be fully preserved unless the order also specifies what other businesses each of the two alternative principal systems may retain, and what, if any, it must dispose of, for only in that event can an informed and rational choice be made. Of course the sale of the transportation properties has no bearing on that result, except to eliminate from the required scope of the order the particular businesses that have been sold, for each of the two principal systems still retains other businesses (Pet. Br., p. 130), principally the Gulf States water business. Indeed the Commission recognizes (Com. Br., p. 93) that, on the premise of an alternative order, the issues of the other businesses are not moot if the decision below may be held to announce a rule requiring the Commission's order to follow the court's views on the governing standard under the "other business clauses". There is no doubt that the decision below was intended to constitute a controlling precedent on that point (R. 1229).

The Commission has clearly declared the result, according to its view, that must obtain with regard to the Gulf

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States water business under an alternative form of order. There is a present, actual, antagonistic assertion of right as to that result and as to the standard by which that result is controlled. So a case or controversy is presented now on that point. It is in the interests of orderly and economical judicial procedure to review that question now rather than in some future appeal, in order that the whole case may be disposed of by this decision, subject to the administrative action that will need to be taken in the light of the standards so determined.

On the merits of the issue, the chief point of emphasis in the Commission's brief is that since the Act speaks of "such other businesses as are reasonably incidental or economically necessary or appropriate to the operations of such integrated public utility system", the *operations* of such system are the touchstone of decision (Com. Br., p. 94, *et seq.*). Again on the premise, however, that the Congress is the best exponent of its own intentions, we submit it is decisive that, as soon as that requirement was inserted in the bill, it was liberalized by a provision in terms that the *Commission "may permit" as in satisfaction of that requirement any interest in any business that complies with the standard approved in the court below.*

So in reaching this result the court below was not disregarding any part of the statutory language (Com. Br., p. 99) but was following the plain and unequivocal direction of the Act. The plain meaning of the words is not to be overcome by supposed difficulties of decision in particular cases. It will not be necessary, for example, as the Commission's brief says (Com. Br., pp. 102, 103), to decide broad questions of economic policy whether the advantages of diversity of investment, or maintenance of existing conditions, outweigh the advantages of some different arrangement of operating properties. The statutory words are in

the alternative. They contemplate retention of other business if such retention is either (*a*) necessary or (*b*) appropriate for any of the following purposes, that is, (*i*) the public interest, (*ii*) the protection of investors, or (*iii*) the protection of consumers, provided, in each case, that such retention is "not detrimental to the proper functioning of such system or systems".* So the Commission does not have to formulate a policy in these broad areas. The Congress has done so. And the standard embodying that policy is satisfied if retention is either necessary or appropriate for either one of the three declared purposes, provided, of course, that it is "not detrimental to the proper functioning." In this overriding proviso the Congress must be taken as expressing the full scope of its intention so far as the concept of operations is concerned, and it is not competent for the Commission to create an additional proviso by implications and generalizations from other language in the Act. Nor, with this enacted proviso, as the court below pointed out (R. 1226), is there any danger that full protection of the genuine statutory purposes may be inhibited.

Of course the word "may" in the "other business clauses" means "must" or "shall". It would be inconceivable to give the Commission a prerogative of caprice, by which properties that satisfy the specified standards for retainability might be retained or divested as the Commission

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* The Commission's apprehensions may have been prompted by its apparent understanding of the statutory words as being in the conjunctive and requiring satisfaction of *all* the enumerated requirements. *E. g.,*

> " . . . it would have been the duty of the Commission to permit the retention of Engineers' transportation business if the Commission had been satisfied that the public interest *and* the interest of investors *and* consumers would have been advanced thereby *and* that such retention would not have been detrimental to the proper functioning of its integrated system" (Com. Br., 114, italics added).

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might choose to prefer in the entire absence of any standards to guide it in determining whether compliance with the specified standards shall suffice for retention, or not. Surely the Commission does not intend to urge such a revolutionary doctrine. The legislative language must be read so as to work, and this means that, upon satisfaction of the specified requirements, permission for retention shall issue as of course.

These conclusions, which we think impelled by the manifest meaning of the statutory words, are fortified by the legislative history, as shown at length in our main brief (Pet. Br., pp. 133-147).

No question is presented here of any finding adverse to retention of the Gulf States water business under these specified standards. Much is made in the Commission's brief of an equivocal finding in this regard that, in the light of previous occurrences, common ownership of the Virginia transportation business "*has been* detrimental to the proper functioning of the electric system and adverse to the interests of consumers and investors" (Com. Br., pp. 114-117). We do not comment on the basis, or effect, of that finding, because the issue, by the sale of the Virginia transportation business, is now clearly moot. But the Gulf States water system has not been sold and no such finding was made in regard to it (R. 124-126).

So in any case the remand by the court below in consequence of its decision on the other business standard, was not dilatory, as the Commission contends (Com. Br., p. 117), but was a proper step for the protection of the right of choice of the principal system which it properly sustained (R. 1231). A rational choice between alternative systems can not be made under piecemeal orders of the Commission. If the Commission's order were deemed severable with respect to each of the component properties,

as the Commission urges (Com. Br., pp. 126-129), it would never become practical for Engineers to exercise its statutory right to select its principal system. For full observance of the statutory requirements, the order is necessarily unitary and must cover the whole field before it can operate.

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